

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TELADOC HEALTH, INC.,
Petitioner,

v.

DATA HEALTH PARTNERS, INC.,
Patent Owner.

Case IPR2024-00617
Patent 11,151,142 B2

SUPPLEMENTAL DECLARATION OF DR. BRYAN BERGERON
IN SUPPORT OF
PETITIONER'S REPLY TO PATENT OWNER'S RESPONSE

TABLE OF CONTENTS

I.	INTRODUCTION AND SCOPE OF WORK	1
II.	BASIS FOR OPINIONS	2
III.	ISSUES CONSIDERED.....	2
A.	Claim 3 – Wizard Application.....	2
B.	Claim 6 – Intervention Plans.....	4
C.	Claim 7.....	5
D.	Claim 10 – Data Associated with Assigned Clients.....	6
E.	Claim 11.....	8
F.	Claim 16.....	9
G.	Motivation to Combine Douglas and Wager	11
H.	Virginia is Analogous Prior art.....	13
I.	Petitioner Properly Identified the Combinations in Grounds 4, 6, And 8.....	15

LIST OF DOCUMENTS CONSIDERED

Exhibit	Shorthand	Description	Previously Used
1001	'142 Patent	U.S. Patent No. 11,151,142 B2	X
1002	Douglas	Pub. No. WO 1999/003045 A1	X
1003	Wager	Pub. No. US 2006/0149589 A1	X
1004	Chitiveli	Pub. No. US 2013/0179450 A1	X
1005		Omitted	
1006		Omitted	
1007		Omitted	
1008	ArchiveDec	Declaration of Nathaniel E Frank-White	X
1009	Koh	Hian Chye Koh & Gerald Tan, <u>Data Mining Applications in Healthcare</u> , 19 J. Healthcare Information Management 64 (2005)	X
1010	KohArchive	Printout of: https://web.archive.org/web/20050418095732/http://www.himss.org/ASP/publications_jhim_issue.asp?issue=3/30/2005 , evidencing 2005 public availability of Koh	X
1011	Hall-Ellis	Declaration of Sylvia D. Hall-Ellis, Ph.D.	X
1012	Bergeron	Declaration of Bryan Bergeron, M.D.	X
1013	BergeronCV	Curriculum Vitae of Bryan Bergeron, M.D.	X
1014	Microsoft	<u>Microsoft Computer Dictionary</u> (5th ed. 2002)	X
1015	ADAA	Printout of https://web.archive.org/web/20100116093130/https://adaa.org/supportgroups	X
1016		Omitted	
1017		Omitted	

1018	NetSuite	Printout of https://web.archive.org/web/20111102042326/https://www.netsuite.co.uk/portal/uk/resource/articles/cloud-computing.shtml	X
1019	Wright	U.S. Patent No. 10,471,588 B2	X
1020	Prgomet	Prgomet et al., <u>The Impact of Mobile Handheld Technology on Hospital Physicians' Work Practices and Patient Care: A Systematic Review</u> , 16 J. Am. Med. Inform. Assoc. 792 (2009)	X
1021	InfoGrasp	Printout of https://web.archive.org/web/20100812105813/https://infograsp.com/technology/benefits-of-web-applications/	X
1022	Virginia	<u>Autism Spectrum Disorders and the Transition to Adulthood</u> , VA Dep't of Educ. (2010)	X
1023	VirginiaArchive	Printout of https://web.archive.org/web/20111208001834/http://www.doe.virginia.gov/special_ed/disabilities/autism/index.shtml , evidencing 2011 public availability of Virginia	X
1024	Ardehali	Deposition Transcript of Hossein Ardehali, M.D.	

I. INTRODUCTION AND SCOPE OF WORK

1. My name is Bryan Bergeron. I am over the age of twenty-one (21) years, of sound mind, and capable of making the statements set forth in this Supplemental Declaration. I am competent to testify about the matters set forth herein. All the facts and statements contained herein are within my personal knowledge, and they are, in all things, true and correct.

2. I have been retained by Teladoc Health, Inc. (“Teladoc”) to provide my opinions and views on the materials I have reviewed related to U.S. Patent No. 11,151,142 B2 (the “’142 Patent”), and the scientific and technical knowledge regarding that subject matter. I have been asked to consider what a person of ordinary skill in the art (“POSITA”) at the time of the invention (“TOI”) of the ’142 Patent would have understood about the issues I address below. I have been asked to assume by counsel for Teladoc that the TOI was March 15, 2013.

3. I submitted my original declaration in support of the Petition for *Inter Partes* Review of U.S. Patent No. 11,151,142 on March 1, 2024 as Exhibit 1012 (“Original Declaration”).

4. I submit this Supplement Declaration to address certain issues raised in Patent Owner’s Response (Paper 15) and in support of Petitioner’s Reply.

5. My supplemental opinions, set forth below, are guided by my appreciation of how a POSITA would have understood the state of the relevant art,

the teachings of the references I discuss below, and the claims of the '142 Patent at the TOI.

6. My Original Declaration sets forth my education, experience, compensation, legal considerations, and my opinion of the level of ordinary skill in the art of a POSITA. There are no material changes to those portions of my Original Declaration since it was submitted.

II. BASIS FOR OPINIONS

7. My opinions are based on my education, training, and experience, as well as items that I reviewed to prepare my opinions, including the '142 Patent and at least the documents listed in the table at the beginning of this Supplemental Declaration, along with other documents from this proceeding.

III. ISSUES CONSIDERED

8. I was asked to consider certain issues raised in Patent Owner's Response, which I address below. My opinions in this Supplemental Declaration are limited to the issues raised below.

A. Claim 3 – Wizard Application

9. I understand that Patent Owner ("PO") argues that Douglas does not satisfy the limitation of "establishing desired outcomes for the client associated with treatment or assistance utilizing a wizard application."

10. In support of this position, I further understand that PO argues that "a 'wizard application' cannot be an interactive help utility 'within an application'; it

must *be* the application.” Paper 15 at 11-12, 23. In this connection, PO argues that “the purported functionality [of the claimed wizard application] cannot be within an application to satisfy the claim; it must be the application.” *Id.* at 23.

11. Aside from the claims, nowhere in the ’142 Patent is the term “wizard application” recited. Instead, the specification of the ’142 Patent uses the term “goal wizard” or “wizard.” Furthermore, nowhere in the claims or specification of the ’142 Patent is there any discussion that the wizard application must be a standalone application, as PO proposes.

12. As such, the Petition and my Original Declaration rely on the plain and ordinary meaning of the term “wizard application” that a POSITA would have understood. Paper 1 at 31; Bergeron at ¶92. In this connection, I consulted the Microsoft definition for “wizard,” which means “[a]n interactive help utility within an application that guides the user through each step of a particular task.” Microsoft at 573. In my opinion, because the specification does not use the term “wizard application” and instead uses “goal wizard” or “wizard,” a POSITA would have consulted the Microsoft definition of “wizard” in applying the plain and ordinary meaning of “wizard application.”

13. Although not required by the claim, Douglas does disclose PO’s added limitation, as “the system prompts the physician or case advisor to assign intensity levels 51 corresponding to the patient's diet, exercise, stress management, need for

group support, anticipated compliance, and pharmaceutical requirements.” Douglas at 7:33-37; Paper 1 at 31-32.

14. Thus, Douglas discloses “active facilitation of input through sequential or hierarchical prompts,” as asserted to be required by PO, since the prompting for assigning of an intensity level associated with a category is an active facilitating of input, and doing so for a plurality of intensity levels associated with different categories involves sequential or hierarchical prompts.

B. Claim 6 – Intervention Plans

15. PO argues that the “intervention plans” of claim 6 must be “received from the providers utilizing computing or communication devices in communication with the server” and that the Petition fails to discuss Douglas satisfying this alleged requirement. Paper 15 at 28-29. I understand from counsel that PO is wrong on both fronts.

16. In any event, although not required by claim 6, Douglas’s intervention plans would be “received from the providers utilizing computing or communications devices in communication with the server.”

17. Douglas’s intervention plans include negative interventions, such as “notify[ing] the physician ... that ... goals are not being met,” which “must ... be addressed by the physician.” Douglas at 11:18-11:22. Douglas also states “if a health risk is present ... the system will automatically send an alarm to the physician

... and require his or her immediate action.” *Id.* at 11:11-17. Douglas goes on to state that the physician can determine whether to modify the program. *Id.* at 11:31-12:2; FIG. 60.

18. Such a modified program from the physician (i.e., intervention plan) would be “received from the providers utilizing computing or communications devices in communication with the server” because, in Douglas, the “physicians ... have access to a PC 500,” and “each PC 500 is electronically linked to [the] network server 508 via the Internet 518.” *Id.* at 24:4-13. That is, in my opinion, the modified program would have been received from the physician using the PC 500 in communication with the server 508 via the Internet 518.

C. Claim 7

19. Regarding claim 7, I understand that PO argues that Douglas does not disclose a framework or logic for triggering an alert for missing data and that this would not have been obvious. Paper 15 at 33-34.

20. I disagree with PO’s position. Douglas’s “system periodically correlates the updated patient health information with the program goals to determine the patient's progress and compliance with the program.” Douglas at 11:26-28. Thus, Douglas discloses that its system has the functionality or logic of periodically inspecting and processing the data, which includes the data received from the providers.

21. Additionally, as discussed in the Petition, “Douglas discloses sending an ‘alert’ to a client’s provider should the client’s data indicate a ‘threatening’ situation.” Paper 1 at 36 (*citing* to Paper 1 at Section VIII.A.2(g)-VIII.A.2(h)). Thus, Douglas discloses that its system also has the functionality of sending alerts in response to defined situations.

22. Any adaptation of these existing functionalities or logic of the Douglas system to send an alert to the provider in response to determining there is missing data for the client is within the level of skill of a POSITA.

23. Douglas’s system has the functionality and logic to send alerts in response to a condition, and also has the functionality and logic to inspect and process the client data received from the providers. Sending an alert in response to a condition resulting from the inspecting and processing of the client data received from the providers would have been a relatively minor adaptation, within the skill of a POSITA.

24. As discussed in the Petition, a POSITA would have been motivated to do so to ensure completeness of the data to enable detection of threatening or dangerous situations. *Id.*

D. Claim 10 – Data Associated with Assigned Clients

25. PO argues that Douglas fails to disclose the limitation of “prompting the providers to provide data associated with assigned clients” of claim 10, based on

a proposed construction that “prompting” requires “guid[ing] the user through competing fields” via, e.g., “a series of probes or questions.” Paper 15 at 34-35. I disagree.

26. In my opinion, the plain and ordinary meaning of “prompting” is getting a user to enter data. This is supported by PO’s citation to the ’142: “the process may begin by prompting a user to enter fields and information for generating a goal, data collection method, and graphing set-up.” *Id.* (citing ’142 Patent at 23:11-23).

27. Douglas satisfies the plain and ordinary meaning of “prompting” in the limitation of “prompting the providers to provide data associated with assigned clients.” Douglas discloses such prompting in the form of displaying fields for entering patient data by providing a space for entering data labeled with the type of data that is to be entered (*see* Douglas at FIG. 4 (fields 46 and 48 for receiving, e.g., “Blood Pressure” data)), Douglas at FIG. 46 (space for entering, e.g., “TOTAL ... CALORIES”). Douglas at 7:17-32. In my opinion, a POSITA would have understood Douglas’s providing a space for entering data labeled with the type of data to be entered as “prompting.”

28. I also understand that PO further contends that the Petitioner’s read of “prompting” on these aspects of Douglas would render claims 1 and 10 identical in scope. I disagree.

29. Douglas's fields must first be created (like in claim 1) before they can be displayed for prompting (in claim 10) the "entering [of] patient data ... by providing a space for entering data labeled with the type of data that is to be entered." Displaying the fields in Douglas is clearly "prompting the providers to provide data associated with assigned clients" according to the plain and ordinary meaning of claim 10. A POSITA would have understood that creating fields is different than displaying and labelling them.

E. Claim 11

30. For claim 11, I understand that PO argues that Petitioner never alleges that relational database 522 of Douglas is "in communication" with server 508. Paper 15 at 37-38. I disagree.

31. For Limitation 11[i], the Petition cites to Douglas 24:28-37 (Paper 1 at 43), which makes clear that "[t]he servers 510-516 *have access to* one or more relational databases 522 (such as SQL) that contain all the health plan data, including information input to the journal and schedule book information." Douglas at 24:28-30 (emphasis added).

32. A POSITA would have understood that servers 510-516 "hav[ing] access to" the database 522 means that they operationally interact with the database, such as by reading data from the database and/or by writing data to the database,

which necessarily encompasses the database 522 being in communication with the servers 510-516.

33. Additionally, for Limitation 11[a], the Petition makes clear that “network server 508 includes an ‘inner circle server [514],’” and further cites to Douglas FIG. 59, which shows that the network server 508 includes servers 510-516. Paper 1 at 40; Douglas 24:13-19.

34. A POSITA would have understood that, since servers 510-516 are part of server 508, the fact that the database 522 is in communication with servers 510-516, as discussed above, also means that the database is in communication with server 508, as the database is in communication with its constituent components, i.e., servers 510-516.

F. Claim 16

35. For claim 16, I understand that PO alleges that Petitioner merely sets forth conclusory allegations, without citing to any evidence that a processor within network server 508 of Douglas executes a set of instructions. Paper 15 at 38-39.

36. I disagree with PO’s position. For claim 16, the Petition cites to the discussion of Limitation 11[a], which explains that “Douglas’s system is software and therefore a processor executes the system” and cites to Douglas at 25:22-26, which makes clear that the Douglas “system is constructed using the C++ programming language in conjunction with SQL 6.5, Cold Fusion, commercially

available from Alaire Company, Visual Basic, commercially available from Microsoft Corporation), and HTML.” Paper 1 at 45, 39.

37. A POSITA would have understood these citations to be evidence that the Douglas system processor executes a set of instructions. That is, a POSITA would have understood that a software system constructed using a programming language includes a set of instructions generated by the programming language.

38. A POSITA would have understood that the Douglas system processor executing software, as discussed in the Petition, necessarily involves the processor executing the set of instructions of the software system generated by the programming language.

39. The Petition for claim 16 also cites to Chitiveli at [0044]-[0046] as evidence of a POSITA’s general knowledge. Paper 1 at 45.

40. The cited portions of Chitiveli make clear that a software system consists of “programming instructions,” that are executed by a processor, as they indicate that a software application is stored in memory, and the programming instructions of which are retrieved by a processor for execution. *See* Chitiveli at [0045] (“CPU 205 retrieves and executes programming instructions stored in the memory 230.”), [0046] (“memory 230 includes the content analytics tool 110 . . . [that] provides a software application”). This is further evidence that a processor executing software executes programming instructions.

G. Motivation to Combine Douglas and Wager

41. I understand that PO argues that a POSITA would not have been motivated to combine Douglas and Wager for Grounds 2 and 8. Paper 15 at 41-50. As part of this position, I understand that PO argues that Wager's system is redundant of the assignment process in Douglas. *Id.* at 44. I disagree.

42. It is my opinion that one reason Wager's interface would not have been redundant, in addition to others, is that it would have facilitated reassignments between physicians and clients, when such became necessary.

43. The need for reassignments could arise naturally, without any forced reassignments of the kind suggested by PO. A POSITA would have understood that reassignments could be voluntarily desired or needed by a patient in a number of scenarios.

44. For example, a patient would voluntarily desire a reassignment if the patient determines that he or she does not like an initially assigned provider and would instead like a different provider. A patient may grow to dislike a provider for a number of reasons, such as disliking the provider's perceived effectiveness or personality, or as a byproduct of developing a desire to try the services of a different provider.

45. In another example, a patient voluntarily needs a reassignment when an initially assigned provider retires or leaves the practice, where, without such a reassignment, the patient would be left without a provider.

46. In yet another example, a patient voluntarily needs a reassignment when a patient's medical condition takes an unexpected turn, and the initially assigned provider is no longer appropriate or sufficient, and instead the patient's condition requires a different provider, such as having a different area of experience or expertise.

47. I understand that PO's expert confirmed that there are instances in which it would be beneficial to switch providers. Ardehali at 113:9-115:4.

48. I further understand that PO also argues that there is no motivation to combine Douglas and Wager because of harm to a patient due to a disruption in the continuity of care. Paper 15 at 44-47. I disagree.

49. In my opinion, the proposed combination of Douglas and Wager does not require forcibly reassigning patients against their will—nowhere in the Petition is this suggested, or any combination proposed that this would result. Indeed, a POSITA operating the combined Douglas-Wager system would not have used it in this way. Instead, the incorporated interface of Wager provides a way to effectively assign and reassign patients according to the patient's desires and to provide improved care for the patient. Paper 1 at 47-53.

H. Virginia is Analogous Prior art

50. It is my opinion that Virginia is analogous art.

51. First, Virginia is from the same field of endeavor as the '142 Patent. The '142 Patent is directed to “tracking goal progression” for “organizations and institutions that help individuals with disabilities and significant emotional or behavioral challenges,” such as “individuals with physical disabilities, autism, chemical imbalances, mental disorders, behavioral problems, drug addictions, and other conditions,” and can be used for “educational instruction.” Paper 1 at 69, '142 Patent at Abstract, 1:12-26, 4:26-32; Paper 15 at 5-6; Ardehali at 183:3-186:5. The '142 Patent also discloses an embodiment of data tracking and graphing involves using a “minimum growth line [as] a reference point against which ongoing data ratings are compared to assess status and level of progress.” '142 Patent at 6:48-50.

52. Virginia substantially overlaps with this field of endeavor of the '142 Patent. Virginia is a guide to transitioning students with autism to adulthood using an individualized plan, having measurable educational goals, and assessing progress towards those goals using an “evidence-based teaching strategy” involving “collect[ing] data in order to either verify the success of the instructional strategy or decide to revise the strategy.” Paper 1 at 67-69; Virginia at 27; Ardehali at 195:17-202:18.

53. As part of this approach, Virginia includes a substantial discussion of using a “minimum growth line” against which performance can be compared and the strategy potentially revised as a result. Paper 1 at 67-69; Virginia at 27-28; Ardehali at 202:19-204:17.

54. Virginia thus overlaps with the field of endeavor of the ’142 Patent at least with respect to tracking progress towards goals, doing so for individuals with disabilities, such as autism, using evidence based mathematical assessments of progress such as a minimum growth line, and doing so in the context of educational instruction.

55. It is my opinion that PO’s proposed field of endeavor too narrowly focusses on “technology-driven systems,” “sophisticated software platforms,” and “data intelligence,” and ignores large areas of subject matter addressed in the ’142 Patent. For example, PO ignores the ’142 Patent’s substantial discussion of tracking goal progression in the context of individuals with disabilities such as autism and other conditions, the use of minimum growth lines to measure progress towards goals, and the application of its purported invention to education.

56. Second, Virginia is also reasonably pertinent to the problem addressed by the ’142 Patent—“how to assess an individual’s progress toward a goal.” Paper 1 at 69. PO similarly describes the problem addressed by the ’142 Patent as “how to efficiently track, analyze, and manage goal progression to improve outcomes for

clients in behavioral health settings.” Paper 15 at 60. This problem, stated either way, is not exclusive to technology, as PO argues, but a problem fundamental to goal tracking. Because the inventors of the ’142 Patent were concerned with solving problems related to tracking goal progression in behavioral health settings, such as for individuals with autism, they would have logically looked to other teachings about tracking goal progression for individuals with autism, such as in Virginia.

I. Petitioner Properly Identified the Combinations in Grounds 4, 6, And 8

57. I understand that PO argues that Wager was discussed in Ground 2, but not in Ground 4, except in the heading. Paper 15 at 62-64. According to PO, it is unclear how Wager’s visual interface would have been incorporated into the Douglas-Chitiveli combination of Ground 4. *Id.* I disagree.

58. For both Grounds 3 and 4, Chitiveli is being added to Douglas for implementation using a cloud and client architecture, and the Douglas-Wager System of Ground 2 remains unchanged in Ground 4.

59. I also understand that PO does not dispute that the Douglas-Chitiveli System is sufficiently disclosed for Ground 3.

60. Ground 4 simply takes the Douglas-Wager System of Ground 2 and adds Chitiveli to Douglas in the same way recited for Ground 3.

61. As evident from the discussion of the Douglas-Chitiveli System, the implementation of Douglas using a cloud and client architecture of Chitiveli does

not change any specific user interface or corresponding functionality of the system and there is no interaction between Wager and Chitiveli.

62. Therefore, by describing the modification of Douglas to include the Wager interface in Ground 2, and by describing the implementation using a cloud and client architecture as in Chitiveli for the Douglas-Chitiveli System in Ground 3, the Petition sufficiently discloses the entire proposed combination of Douglas-Wager-Chitiveli for Ground 4.

63. I further understand that PO argues that Ground 6 is insufficiently disclosed because Petitioner fails to mention Wager or how Wager would interact with Koh's data mining and that Ground 8 is insufficiently disclosed because Petitioner fails to mention how Virginia's disclosure regarding autism treatment frameworks would integrate with Wager's interface. *Id.* at 64-65. I also disagree with these two arguments.

64. Petitioner is simply taking the Douglas-Wager System of Ground 2 and adding Koh for Ground 6 and Virginia for Ground 8 in the same way that Douglas is modified by Koh in Ground 5 and by Virginia in Ground 7, respectively.

65. For Ground 6, the Wager assignment interface and the Koh data mining do not interact, and for Ground 8, the Wager assignment interface and the Virginia autism treatment frameworks functionality do not interact.

66. Thus, there is no need to repeat the descriptions for the Douglas-Koh System of Ground 5 for Ground 6 and the Douglas-Virgina System of Ground 7 for Ground 8, particularly since PO does not dispute that Ground 5 and 7 are sufficiently disclosed.

In signing this Supplemental Declaration, I recognize that the Declaration will be filed as evidence in a contested case before the Patent Trial and Appeal Board of the United States Patent and Trademark Office. I also recognize that I may be subject to cross-examination in the case, and that cross-examination will take place within the United States. If cross-examination is required of me, I will appear for cross-examination within the United States during the time allotted for cross-examination.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Dated:

March 28, 2025

Respectfully submitted,

Bryan P. Bergeron MD

BRYAN BERGERON, MD